No. 90-1869

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

TED M. MARZOUCA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Does Federal Sentencing Guideline §2D1.1(b)(1), providing a sentence enhancement of two levels for the possession of a dangerous weapon, require that the petitioner be shown to have knowingly possessed the weapon, as held by the D.C. Circuit, or merely that the weapon was tangentially connected to the offense, as must be inferred by the Second Circuit's decision below?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TED M. MARZOUCA,

Petitioner,

- against -

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Parties to the Proceedings Below

Petitioner Ted M. Marzouca seeks a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit, filed on March 7, 1991, which affirmed a judgment of conviction entered in the United States District Court

for the Eastern District of New York (Hon. Charles P. Sifton) on February 3, 1989.

Petitioner had several co-defendants in the courts below, namely Derrick A. Reymond, Darrel Graham, Cyllion Mason, Leonard Webley, and Mark Hamilton. There were no other parties to these proceedings.

Jurisdiction and Opinions Below

The unpublished decision of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction of the United States District Court for the Eastern District of New York, was filed on March 7, 1991 (Appendix A). This Court has jurisdiction to review this petition pursuant to 28 U.S.C. §1257(3) and Rules of the Supreme Court, Rule 13.

Statute Involved

18 U.S.C. §924(c)(1). Penalties.

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the

punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of

imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

United States Sentencing Guidelines

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. §841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. §960(b)(1), (b)(2) or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one

or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. §841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. §960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics.

(1) If a dangerous weapon (including a firearm was possessed during commission of the offense, increase by 2 levels.

STATEMENT OF THE CASE

I. The Trial

Law enforcement agents executed a search warrant on Apartment 2R at 192 East 40th Street on June 7, 1988. Upon precipitately breaking the door leading into Apartment 2R without announcing their presence, the agents drew their weapons and entered the apartment.[1] The apartment had two bedrooms, a living room, a kitchen and several closets. The kitchen and a small bathroom were just off to the right from the entrance and the living room was in the back of the apartment, ahead of the entrance. The bedrooms were to the right and left at the back of the living room, with each having a doorway leading into it.

As soon as the agents entered the apartment, Agent Whipple, who was in the

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[1] The warrant did not provide for no-knock authority. This issue, while unsuccessfully raised below, is not being pursued in this petition.

lead, went into the kitchen to see if anyone was there. He observed that the kitchen window was opened, that the television was turned on and tuned to a basketball game, and that on the kitchen table was what appeared to be an amount of cocaine, crack and other paraphernalia including a scale. The rest of the fixtures in the kitchen, which was perhaps a seven foot by eleven- or twelve-foot room, included the chairs around the table, a stove, a sink and a refrigerator which was near the window.

While Whipple was searching the kitchen, Agent Murasky went into a bedroom and observed defendant Cyllion Mason lying on the bed. Mason was placed under arrest, brought into the living room and put on the living room floor. A search of Mason disclosed several keys in his pants pocket, one of which was later found to fit the lock to the apartment.

At the same time, Agent Anderson, who was still outside the apartment, saw a man coming down the stairs from the third floor, running past him. That man, identified as defendant Mark Hamilton, was later placed under arrest.

Subsequently, Agent Gildea found another man hiding between the refrigerator and the outside wall in the kitchen. That man, identified as petitioner Ted Marzouca, was placed under arrest by Gildea. Marzouca, who identified himself as "Teddy," was then brought into the living room, placed on the floor with the others, and searched.

As a result of a search of the whole apartment, the following materials were discovered and seized: From a night table drawer in the right rear bedroom, a plastic bag containing cocaine base; from another drawer also in the right rear bedroom, some .45 caliber bullets and a gun-cleaning kit

along with some keys; from under an end table in the living room, which table first had to be moved in order for the gun to be seen, a loaded 9mm semi-automatic pistol;[2] on top of the kitchen table as well as underneath it, were found cocaine hydrochloride, cocaine base, paper towels, a triple-beam scale, razor blades, a few playing cards, vials, flour and a brown piece of paper with writing, all of which were identified as associated with crack production; and from a bag found in the foyer were several hundred empty vials, rubber gloves, plastic bags and razor blades. Although not seized, an inventory of clothing was seen in one of the bedrooms.

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[2] It was this pistol which served as the basis for petitioner's enhanced sentence.

II. The Sentence

At the opening of the sentencing proceeding, petitioner's defense counsel requested that the two offense levels which had been added by the probation department with respect to the weapon found in the living room be deducted. It was noted that the court had done just that as to at least one other defendant. In this regard, counsel explained that no evidence connected the petitioner, who was found behind a refrigerator in the kitchen, any more than any co-defendant, to the weapon found hidden behind a table in the living room.

Nonetheless, starting with a base offense level of 34, the court added two points for the firearm which was "obviously, a tool of the trade, the jury was persuaded of this defendant and other defendants were engaged with [sic.]."

Based on additional considerations, a total offense level of 39 was arrived at, and given petitioner's criminal history category of II, he was thereupon sentenced on both counts to concurrent terms of imprisonment of 292 months, followed by a 5-year period of supervised release.

III. **The Appeal**

Petitioner appealed his judgment of conviction to the Court of Appeals for the Second Circuit on several grounds, including the contention that the district court erroneously increased petitioner's offense level by two points for possessing a firearm during the commission of a drug offense. Petitioner urged that the two-point increase was based on insufficient evidence that he had any knowledge of the weapon's existence. In response to petitioner's legal argument, based in part on United States v. Burke, 888 F.2d 862

(D.C. Cir 1989) and United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 365 (1990), the Circuit Court held simply:

> Having heard all the evidence at trial, Judge Sifton was entitled to find that the gun was connected to the offense, serving as a means of protection for each defendant present in the apartment (emphasis added) (Appendix, p. 3).

As a consequence of this holding, the Second Circuit is in clear conflict with the D.C. Circuit which has held that evidence of knowing possession is a prerequisite to a sentencing enhancement pursuant to U.S.S.G. §2D1.1(b) and a conviction under §924(c)(1), a statute similar in nature to the guideline at issue and, indeed, which statute's very teachings the government argued in the court below should be applied to interpret the guideline.

REASONS FOR ALLOWANCE OF THE WRIT

A. At Present The Second And D.C. Circuits Are In Conflict As To When A Defendant May Be Penalized For The Presence Of A Firearm At The Scene Of A Drug Offense.

This Court has not yet addressed the criteria for determining the applicability of United States Sentencing Guideline §2D1.1(b), wherein it is provided that

> if a firearm or other dangerous weapon was possessed during the commission of the offense, increase by two levels (emphasis added).

Although the phrase "possessed during the commission of the offense" has not been specifically explained or delineated in the Second Circuit, the provision -- until now -- has generally been applied to situations where firearms were found in close proximity to narcotics and where the government demonstrated that the accused had either actual or constructive possession of the firearm itself, or the

premises in which the firearm was found. See, e.g., United States v. Schaper, 903 F.2d 891, 896 (2d Cir. 1990) (weapon was found in defendant's bedroom and could not be said to be unrelated to ongoing narcotics trade which was conducted from defendant's house); United States v. Megatt, 875 F.2d 24 (2d Cir. 1989) (conviction affirmed where firearms were found in defendant's apartment and defendant admitted to their possession); United States v. Alvarado, 882 F.2d 645 (2d Cir. 1989) (firearms were found in what was clearly shown to be defendant's apartment, indicating per se constructive possession); and United States v. Grant, 545 F.2d 1309 (2d Cir. 1976) (firearms were found in a social club which defendant managed, over which he lived, and to which he had keys, also indicating constructive possession).

The provision has been applied similarly in other circuits. See e.g.,

United States v. Lorentine, 1991 WL 71464 (9th Cir. May 3, 1991) (evidence supported fact that defendant had constructive possession of the gun in that he had dominion and control over the area where gun was found); United States v. Luster, 896 F.2d 1122 (8th Cir. 1990) (firearm was found in defendant's home where drugs were sold); United States v. Burke, 888 F.2d 862 (D.C. Cir. 1989) (§2D1.1 requires more than a showing of mere possession; possession must be knowing, reckless or negligent).

However, in recent decisions, the Second Circuit appears to be breaking from the requirement that a weapon be possessed, and has affirmed several enhancements of sentences on the basis of mere presence of a weapon at the time of a narcotics offense. See, United States v. Pellegrini, 929 F.2d 55 (2d Cir. 1991) (weapon was present at the place the drugs were being stored, and storing drugs is relevant to

the offense of conviction, so upward adjustment based on presence of weapon was affirmed); and United States v. Marzouca (decision below and reproduced in appendix).

In addressing the application of §2D1.1(b) in its appellee's brief in the court below, the government analogized the guidelines provision to 18 U.S.C. §924(c),[3] stating that a rational jury might well have convicted petitioner and his co-defendants had they been charged under 18 U.S.C. §924(c).

Without resorting to §924(c) case law, there is a clear conflict extant between the Second and D.C. Circuits in their interpretation and application of Guideline

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[3] 18 U.S.C. §924(c) provides, in relevant part, that "whoever, during and in relation to a drug trafficking crime, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years...."

§2D1.1. While the Second Circuit has applied the guideline enhancement provision where there is evidence of possession by the defendant of the firearm, the requirement of possession has never been expressly discussed. In fact such evidentiary prerequisite was hopelessly undermined in the decision below.

In contrast, the D.C. Circuit has expressly held in Burke, 888 F.2d at 867, that the sentencing judge should upgrade the sentence of a drug defendant who possessed a dangerous weapon or firearm only where the defendant possessed it "intentionally, recklessly, or by criminal negligence," citing U.S.S.G. §1B1.3(b).[4]

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[4] U.S.S.G. §1B1.3(b) provides general guidance for the application of offense level adjustments. At the time of the Burke decision and of petitioner's trial, that section directed sentencing courts to consider enhancements only where the subject harm was "caused intentionally, recklessly, or by criminal negligence." The November 1989 amendments to the (continued...)

The Burke court explained that this language limited such enhancements to cases where defendant either knowingly was in possession of a weapon, or, if knowledge cannot be proven, where possession was avoidable but for defendant's recklessness or criminal negligence. In the cases where knowing possession cannot be proven, the Burke court instructed that the enhancement will result only when, in addition to having direct physical control of the weapon, the defendant failed to take reasonable steps that would have disclosed the weapon. In sum, the court emphasized that "[t]he critical point here is that the standard we announce today requires more than a showing of mere possession of a weapon." (Emphasis in original.)

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[4](...continued)
guidelines omitted the passage quoted above from §1B1.3 and hence, the scienter requirement of §2D1.1(b)(1) is limited to those cases governed by the pre-November 1989 guidelines.

The holding of Burke must be analyzed in conjunction with another recent D.C. Circuit decision, United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990), in which the application of 18 U.S.C. §924(c) was in issue. In reading the requirement of possession into that statute, the Long Court defined the term in the context of a case remarkably similar to the case at bar. See Long, 905 F.2d at 1579 ("evidence of possession, or evidence from which possession can reasonably be inferred, is a prerequisite to a conviction for 'use' under §924[c][1]").

In delineating the proof necessary to show possession, the Long court held that the proof must include some evidence linking a defendant to the firearm, "other than his presence in the apartment and involvement with narcotics." Long, 905 F.2d at 1577. In that case, the defendant was found by law enforcement agents when he

was "ten to fifteen feet away from the revolver, and was emerging from behind the curtain that divided the room." The circuit court found that there was

> no evidence suggesting that Long was headed for the gun, or that he even knew of its existence. The gun itself was unregistered and yielded no fingerprints. Nor did Long own, lease, or live at the premises on which the gun was found. There is no evidence, in short, that the firearm was ever either actually or constructively in Long's possession. Although the gun was partially visible between the sofa cushions, the visibility, without more, does not establish that any particular person either actually or constructively possessed the gun.

Taken together, Burke and Long make clear that in the D.C. Circuit, a sentence enhancement pursuant to §2D1.1 requires a finding of knowing possession of a weapon. Further, such encompasses more than mere presence of the weapon. Indeed, the Burke/Long rule holds that the presence of a weapon ten to fifteen feet away from a defendant, and in a separate room into

which defendant was not headed does not amount to possession,[5] much less knowing possession of the weapon.

Contrariwise, in the Second Circuit's affirmance herein, the issue of possession was not even discussed in affirming petitioner's sentencing enhancement. Instead, the court held that:

> several defendants argue that there was no evidence connecting them to the firearm that was discovered under a table in the living room. Accordingly, they assert that the district court erred in enhancing their offense levels by two points for possession of a dangerous weapon. See U.S.S.G. §2D1.1(b)(1). We disagree. The commentary accompanying Guideline 2D1.1 instructs that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Id., comment (n.3). Having heard all the evidence at trial, Judge

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[5] As in Long, the gun in the instant case was not registered to petitioner Marzouca and did not bear his fingerprints. Nor did he own, lease or live at the premises at which the gun was found.

> Sifton was entitled to find that the gun was connected to the offense, serving as a means of protection for each defendant present in the apartment (Appendix, p.3, ¶6; emphasis added).

Based on the Second Circuit's decision below, at least two Circuits are now in conflict over whether "possession" requires more than mere presence of the petitioner on the premises where a gun is located, or whether it merely requires "connectedness" of the weapon to the narcotics offense.[6] While the D.C. Circuit requires knowing possession, the Second Circuit is satisfied with mere proof that an accused was simply in the same apartment which he didn't even own -- let alone in a different room from that where the gun was found secreted. For

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[6] Both the Fifth and Seventh Circuits have also followed the reasoning and adopted the holding of the Burke court on knowing possession. See e.g., United States v. Fiala, 929 F.2d 285, 289 (7th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1020 (5th Cir. 1990).

this reason alone, it is respectfully requested that this Court grant petitioner's writ of certiorari to review the relevant law and determine the parameters of §2D1.1(b), specifically, whether "possession" means what it seems to say or the lesser standard embraced by the Second Circuit.

B. If This Court Were To Adopt The D.C. Circuit's View Of Possession, Petitioner Marzouca Would Be Shown Not To Have Possessed The Gun.

In the present case, the defense clearly challenged the government's suggestion of a §2D1.1(b) adjustment at petitioner Marzouca's sentencing, arguing that there was no evidence connecting petitioner to the weapon or proving that he knew the weapon was on the premises. Once challenged, the government did not offer any evidence connecting the petitioner to

the weapon. In effect, the court relied entirely on the proof at trial.

Specifically, petitioner Marzouca was not shown to be in knowing possession of the firearm seized from the apartment -- an apartment not even shown to be rented or owned by him. Petitioner was found behind a refrigerator in the kitchen of the apartment, and the firearm was found outside the kitchen in the living room, secreted behind a table. Further, the table had to be moved to even see and access the gun.

The government has contended that the apartment was used as a crack kitchen, with the main operation taking place in the kitchen where the "cooks" prepared the crack. In light of the fact that the agents burst into the apartment with no notice of their arrival, it is clear that petitioner would not have had time to take the firearm from the kitchen, i.e., the

site of the offense, into the living room to hide it, and then go back into the kitchen. And indeed, it can be presumed that if petitioner knew of the gun and kept it for protection, he would have run for the gun when he heard intruders climbing the stairs to the apartment.

As stated, petitioner was not shown to have owned, rented or resided in the apartment. Cf., United States v. Megatt, supra; United States v. Alvarado, supra. Therefore, unlike the defendants in the afore-cited cases, he did not have automatic constructive knowledge of the weapon. Even the government conceded that the apartment was maintained solely for its kitchen facilities. It is not improbable that petitioner Marzouca did not even enter into the living room. When he was found, all of the materials he was allegedly using were in the kitchen. There was even a television playing in the kitchen,

indicating that all activities took place therein.

Further, the firearm was not only in the living room, but it was wedged between an end table and the wall, which end table had to be moved in order to see, let alone retrieve, the firearm. Thus, since the apartment was not proved to belong to petitioner and he, as the government concedes, was exclusively engaged in the kitchen, petitioner was clearly not in possession of the firearm under the holdings of Burke and Long, supra. Certainly, the firearm, being juxtaposed between furniture and the wall, was not available for quick use in connection with the offense. Lastly, the petitioner cannot be imputed with knowledge of the weapon, as it is more likely that he never even saw it.

In sum, petitioner would not have been subjected to the sentencing enhancement if

he were sentenced in courts within the D.C. Circuit. As in Long, decided on similar facts, "the record in this case is devoid of any evidence linking [petitioner] to the [firearm], other than his presence in the apartment and involvement with the narcotics." Such a discrepancy in the circuits is contrary to justice, and is deserving of clarification by this Court.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 4, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of MARCH, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

HONORABLE REENA RAGGI,*

District Judge.

Nos. 89-1017, 89-1018, 89-1019,
89-1035, 89-1071, 89-1111

SEAL

UNITED STATES OF AMERICA,

Appellee,

v.

DERRICK A. REYMOND, DARREL GRAHAM, CYLLION MASON, LEONARD WEBLEY, A/K/A "Tony Brown", TED M. MARZOUCA, and MARK HAMILTON,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said district court be and they hereby are AFFIRMED.

1. All six defendants were convicted, after a jury trial in the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, of conspiracy to distribute and to possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846 (1988), and possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841 (1988).

2. The defendants contend that the district court erred in denying their motions to suppress evidence seized during the execution of a search warrant. They argue that the Drug Enforcement Administration agents ignored the "knock and announce" obligation set forth in 18 U.S.C. § 3109 (1988). Testimony at the suppression hearing, however, supported Judge Sifton's finding that exigent circumstances excused the agents' duty to give notice of their purpose and authority. *See United States v. Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988) ("Notwithstanding a failure to comply with § 3109, the evidence seized need not be suppressed if the nomcompliance [sic] was excused by exigent circumstances."). Most significantly, upon seeing agents climbing the stairs toward the apartment, defendants Graham and Hamilton rushed into the apartment and slammed the door. Furthermore, the fact that some agents were unaware of their statutory obligation is immaterial, because the circumstances, in addition to being objectively exigent, justified the agents' subjective belief that forcible entry was necessary to prevent escape and the destruction of evidence. *See id.* at 30.

3. Mason and Hamilton challenge the legality of their arrests. Judge Sifton could properly find that Agent Whipple, having seen Hamilton slam the door after rushing into an apartment with drug paraphernalia in open view in the kitchen, had probably cause to arrest Hamilton. Similarly, there was no error in finding that Agent Murawski had probably cause to arrest Mason. There was no apparent reason for Mason to be in an apartment so obviously being used for the manufacture of illegal narcotics. Moreover, as Murawski first entered the apartment, he saw Tony Brown flee from the same room where Mason was found and dive head-first out the living room window.

4. Each of the defendants challenges the sufficiency of the evidence. We conclude that there was ample evidence to support their convictions. All defendants were present in an apartment which contained secreted weapons and narcotics-related items in plain view. Reymond, Brown, and Graham jumped from windows of the second floor apartment as the agents entered. Narcotics records on the kitchen table indicated the existence of an ongoing crack processing operation. Hamilton, Graham, and Reymond all made false exculpatory statements to the agents. Mason possessed the keys to the apartment, and Hamilton possessed the phone numbers of the apartment and two nearby pay phones. Additionally, other defendants had each other's telephone numbers and the telephone number of the apartment. Finally, the recent arrests of Reymond and Mason for crack offenses evidence their knowledge and intent.

5. Various defendants claim that the admission of evidence regarding Reymond's and Mason's prior arrests had an unfairly prejudicial spillover effect. The trial judge is best situated to weigh the probative value of similar act evidence against the danger of unfair prejudice, and his determination will not be disturbed on appeal absent an abuse of discretion. *See United States v. Smith*, 727 F.2d 214, 220 (2d Cir. 1984). We believe that Judge Sifton properly exercised his discretion.

First, he gave a careful limiting instruction both when the evidence was offered and again in his jury charge. Furthermore, Judge Sifton limited the government's use of Reymond's prior arrest, excluding certain similarities with his arrest in this case.

6. Several defendants argue that there was no evidence connecting them to the firearm that was discovered under a table in the living room. Accordingly, they assert that the district court erred in enhancing their offense levels by two points for possession of a dangerous weapon. *See* U.S.S.G. § 2D1.1(b) (1). We disagree. The commentary accompanying guideline 2D1.1 instructs that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *Id.*, comment (n.3). Having heard all the evidence at trial, Judge Sifton was entitled to find that the gun was connected to the offense, serving as a means of protection for each defendant present in the apartment.

7. Marzouca contends that the decision to punish possession of fifty grams of cocaine base at the same level as five kilograms of cocaine (a 100-to-1-ratio) violates the vagueness doctrine because Congress has treated "cocaine base" differently without separately defining the term. This familiar argument has been repeatedly rejected:

> Several circuits have ... repudiated the contention that a sentence imposed under section 841 is invalid because the term "cocaine base" is undefined in the section. *See United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir. 1989) ("[T]hose concerned with the relevant legislation understood cocaine base to refer to crack and intended to enhance penalties for crack dealers."); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (rejecting fifth

> amendment due process-vagueness challenge to section 841 based on the failure by Congress to define the term "cocaine base"); *United States v. Reed*, 897 F.2d 351, 353 (8th Cir. 1990) (rejecting due process-vagueness challenge to section 841 and the sentencing guidelines because they do not define the term "cocaine base").

United States v. Pinto, 905 F.2d 47, 50 (4th Cir. 1990); *see also United States v. Avant*, 907 F.2d 623, 625-27 (6th Cir. 1990); *United States v. Van Hawkins*, 899 F.2d 852, 853-54 (9th Cir. 1990); *United States v. Brown*, 859 F.2d 974, 975-76 (D.C. Cir. 1988) (per curiam).

8. Finally, Marzouca challenges the three-point enhancement of his offense level for being a "manager or supervisor" of the cocaine operation. *See* U.S.S.G. § 3B1.1(b). The government concedes that under *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), the out-of-court declarations of the government's confidential informant must be corroborated. We conclude that Agent Whipple's testimony regarding the informant's past reliability, together with the evidence at trial that the drug records were in Marzouca's handwriting, constituted sufficient corroboration of Marzouca's role in the offense.

/s/Ellsworth A. Van Graafeiland, U.S.C.J.
Hon. Ellsworth A. Van Graafeiland, U.S.C.J.

/s/J. Daniel Mahoney
Hon. J. Daniel Mahoney, U.S.C.J.

/s/Reena Raggi
Hon. Reena Raggi, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

Supreme Court, U.S.
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No. 90-1869

In the Supreme Court of the United States

OCTOBER TERM, 1991

TED M. MARZOUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's offense level was properly increased by two points under Sentencing Guidelines § 2D1.1(b)(1), which provides for such an increase if a firearm "was possessed during commission of the offense."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported, but the judgment is noted at 930 F.2d 910 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1991. The petition for a writ of certiorari was filed on June 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to distribute and possess with intent to distribute cocaine base, in

violation of 21 U.S.C. 846, and possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 292 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A.

1. Briefly summarized, the evidence at trial showed that petitioner and his co-defendants operated a crack cocaine manufacturing operation inside a second floor apartment in Brooklyn, New York. On June 7, 1988, federal agents executed a search warrant for the apartment. As the agents entered, the occupants of the apartment tried to flee. Petitioner sought to avoid arrest by wedging himself between the refrigerator and a kitchen wall. After the agents arrested petitioner, they seized the keys to a Mercedes Benz from his pocket. From the kitchen table, they seized a large quantity of newly cooked crack cocaine that was drying on a paper towel, assorted paraphernalia that was used in preparing crack cocaine for distribution, and a written record of narcotics activity in petitioner's handwriting. In other parts of the apartment, the agents found more cocaine, thousands of crack cocaine vials, and cash. They also found a fully loaded .9 millimeter semi-automatic pistol on the floor under an end table in the living room. In a bedroom dresser, they found .45 caliber ammunition and a gun cleaning kit. In a post-arrest statement, petitioner told the agents that he had not worked in two years. Gov't C.A. Br. 4, 10, 12, 18-20.

2. At the sentencing hearing, an agent testified about information provided by a confidential informant who had visited the Brooklyn apartment on four

occasions prior to the search.[1] According to the informant, petitioner and his cousin, Michael Lawrence, were partners in the business, which processed two or three kilograms of crack cocaine each week. No one lived at the apartment; instead, it was used strictly to manufacture the drug 24 hours a day. The cousins employed a variety of workers, including cooks, cutters, packagers, steerers, street dealers, lookouts, and an "enforcer," whose job was to collect drug debts. Gov't C.A. Br. 22-24.

In calculating petitioner's offense level under the Sentencing Guidelines, the district court found that petitioner was a "supervisor" in the organization and therefore enhanced his base offense level by three levels pursuant to Guidelines § 3B1.1(b). Gov't C.A. Br. 25. The court also enhanced his base offense level by two levels pursuant to Guidelines § 2D1.1(b)(1) after finding that a firearm was possessed during the commission of the offense. Gov't C.A. Br. 50. Petitioner's final offense level was 39. He was sentenced to 292 months' imprisonment, which is within the applicable Guidelines sentencing range for that offense level and for petitioner's criminal history category. Gov't C.A. Br. 25.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A. The court held that the district court properly enhanced petitioner's offense level for possession of a dangerous weapon during the course of the offense. The court noted that the

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[1] The informant had provided information in the past that led to federal narcotics convictions, an FBI wiretap, and state murder charges. After his work in this case, he became a paid informant for the Drug Enforcement Administration and provided information leading to the seizure of one kilogram of cocaine and three federal narcotics arrests. Gov't C.A. Br. 23.

commentary accompanying Guidelines § 2D1.1 states that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Application Note 3. In light of the evidence at trial, the district court "was entitled to find that the gun was connected to the offense, serving as a means of protection for each defendant present in the apartment." Pet. App. A4.

ARGUMENT

The court of appeals correctly upheld the two-level increase in petitioner's base offense level due to the presence of firearms during the cocaine conspiracy. At the time petitioner was sentenced, Guidelines § 2D1.1(b)(1) directed the sentencing judge to increase by two the base offense level for a drug trafficking offense "[i]f a firearm or other dangerous weapon was possessed during commission of the offense."[2] The commentary explains that "[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Application Note 3. As the commentary makes clear, the adjustment does not depend on proof that the defendant personally possessed the gun. Rather, it applies whenever the weapon was present and connected with the offense. Petitioner's contention that the enhancement applies only if he possessed the fire-

[2] Sentencing Guidelines § 2D1.1(b)(1) was amended effective November 1, 1989. "[D]angerous weapon (including a firearm)" was substituted for "a firearm or other dangerous weapon." The pertinent commentary was not changed.

arm or knew it was present finds no support in the text of the Guideline or its explanatory commentary. See *United States* v. *Lanese*, 890 F.2d 1284, 1292 (2d Cir. 1989) (knowledge of co-participant's possession of firearm is not required), cert. denied, 110 S. Ct. 2207 (1990); *United States* v. *Otero*, 890 F.2d 366, 367 (11th Cir. 1989) (same).

The general principles of relevant conduct under the Guidelines support this conclusion. At the time of petitioner's sentencing, Guidelines § 1B1.3(a) provided that in determining the defendant's offense level, the court should take into account "all acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable." [3] Under the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), petitioner was properly deemed accountable for the foreseeable possession of a firearm during the narcotics conspiracy by any of his co-conspirators. Therefore, under Guidelines § 1B1.3(a), the government was not required to show which of petitioner's co-conspirators had placed the loaded pistol in the living room or that petitioner knew the gun was present. See *United States* v. *Sanchez*, 928 F.2d 1450, 1459 (6th Cir. 1991) (for enhancement, the government need only show that the firearm was "possessed" by a member of the conspiracy and that the member's possession was reasonably foreseeable); *United States* v. *Garcia*, 909 F.2d 1346, 1349-1350 (9th Cir. 1990) (adjustment proper where co-

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[3] Sentencing Guidelines § 1B1.3 was amended effective November 1, 1989. The phrase "for which the defendant would be otherwise accountable" was substituted for the phrase "by a person for whose conduct the defendant is legally accountable."

defendant's possession of gun was reasonably foreseeable due to the large quantity of drugs involved); *United States* v. *Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990) (quantity of narcotics sufficient to support inference that co-conspirator's possession of a gun was reasonably foreseeable); *United States* v. *White*, 875 F.2d 427, 433 (4th Cir. 1989) (adjustment proper where co-participant's possession of a firearm was reasonably foreseeable).

The cases on which petitioner relies are easily distinguished and do not conflict with the decision below. For instance, *United States* v. *Long*, 905 F.2d 1572 (D.C. Cir.), cert. denied, 111 S. Ct. 365 (1990), does not involve a construction of the Sentencing Guidelines. Instead, the court there reviewed the sufficiency of the evidence underlying the defendant's conviction for "using" a firearm during the course of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). Significantly, Guidelines § 2D1.1(b)(1) does not require the "use" of a firearm during the offense. Moreover, *Long* makes clear that although the court found the evidence insufficient to prove a substantive violation of Section 924(c)(1), the result might have been different if, as here, Long had been charged with conspiracy: "This analysis assumes a situation in which the government prosecutes a defendant for violating the statute as a principal. * * * [A] defendant involved in a conspiracy, regardless of whether he has possessed a firearm, can be punished as a principal based on the rule of vicarious liability for coconspirators." 905 F.2d at 1577 n.8.

In *United States* v. *Burke*, 888 F.2d 862 (D.C. Cir. 1989), the defendant was traveling alone when officers searched his tote bag and found heroin and a gun. The court of appeals held that Burke's sentence for possession of heroin could be enhanced under

Guidelines § 2D1.1(b)(1) only if the district court found that he knowingly possessed the gun or was reckless or criminally negligent in failing to ascertain that his tote bag contained a gun. 888 F.2d at 867-868. But the court also made clear that where more than one person is involved in a drug trafficking offense, enhancement is appropriate under Guidelines § 2D1.1(b)(1), as long as the defendant could reasonably foresee that one of his associates would possess a gun in connection with the offense. 888 F.2d at 868. See also *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 305 (D.C. Cir. 1991). In this case, where petitioner supervised a crack cocaine processing operation and hired an "enforcer" as part of his staff, he could readily foresee the possession of a firearm in connection with the offense. *Burke* is therefore distinguishable.

Furthermore, the scienter requirement adopted in *Burke* was based on former Guidelines § 1B1.3, which compelled the sentencing court to take into account the defendant's mental state in determining whether to enhance a sentence on the basis of uncharged conduct. In November 1989 that Section was amended to delete the scienter requirement; therefore the analysis employed in *Burke* will not apply to defendants sentenced for crimes committed after the effective date of the amendment. See *United States* v. *Lam Kwong-Wah*, 924 F.2d at 304 (scienter is not required as a general matter under the amended Guidelines); *United States* v. *Fiala*, 929 F.2d 285, 289 (7th Cir. 1991) (same); *United States* v. *Suarez*, 911 F.2d 1016, 1020 (5th Cir. 1990) (same). Any tension between the decision in *Burke* and the unpublished decision in this case will therefore have no continuing significance for future cases. More generally, because the Sentencing Commission

regularly promulgates clarifying amendments on sentencing issues that divide the lower courts, the intervention of this Court is not ordinarily needed to resolve a dispute over the proper interpretation of a Guideline. *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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